IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 1768 OF 2005.

Jayantilal Hirachand Jain. .... Applicant.

Versus.

The State of Maharasthra. .... Respondent.

Shri Shahid Azmi for the Applicant.

Shri K.V.Saste, A.P.P. for the Respondent.

CORAM : ABHAY S. OKA, J.

DATED : 7th October, 2005.

P.C.:

1. This is an application for bail. The Applicant has been charged for offences punishable under sections 395, 397 of the Indian Penal Code, read with section 37(1)(a), 135 of the Bombay Police Act, 1951 and section 3(1)(iii), 3(2), 3(4) of the Maharashtra Control of Organized Crime Act, 1999 (hereinafter referred to as "MCOC Act").

2. F.I.R. was lodged on 13th May 2005 by one Vinod Chandrabhan Punamiya. The first informant is running a jewellery shop with the help of his three brothers. Apart from running a jewellery shop, business of the

first informant is to supply golden ornaments to other jewellers. On 11th may 2004, at the time of closing the shop, the first informant carried with him ornaments worth Rs.8.50 lakhs with him as on the next day he wanted to deliver the said ornaments to a merchant at Surat.

3. On 12th May 2004, early in the morning the first informant started for Surat and for that purpose he was walking on the road towards Fanaswadi Naka for getting a taxi for reaching Bombay Central Station. At that time, two persons came from the front side. One of them took out a knife and placed it below his neck and snatched the bag in the hands of the first informant. The said two persons ran away towards Fanaswadi. The first informant screamed. He noticed that there were three to four persons on the road, who did not help him. According to him immediately he went back to his residence. The first informant felt depressed and therefore, he slept at home and after calling his brothers he lodged the F.I.R. in the evening on 13th May 2004. On 20th July 2004, a supplementary statement of the first informant was recorded in which he has stated that when he came down from his house there were eight persons standing near his building. Four persons

started walking in front of him and other four persons were following him. When he reached Khemka Bhavan, out of the four persons walking in front of him stopped and one of them took out knife and placed it below the neck and the another snatched the bag. In another supplementary statement recorded on 27th September 2004, the first informant stated that he suspected that the Applicant has given information to the accused persons as the Applicant was aware about the business activities of the first informant.

4. The learned Advocate appearing for the Applicant submitted that there is no active role attributed to the Applicant in the offence and he was not present at the time of offence. He submitted that there was no recovery made at the instance of the Applicant. He submitted that the statement of a witness under section 164 of the Code of Criminal Procedure, 1973, recorded after a lapse of six months cannot be used against the Applicant. He submitted that no identification parade has been held. He submitted that even the statement of accused No.1 recorded under section 164 of the said Code does not indicate the actual participation of the Applicant in the offence. He relied upon the decision of the Apex Court reported in 2005 SCC (Cri.) page 1007

(Vasanthi v/s. State of Andhra Pradesh) and submitted that the Applicant was sought to be involved by the first informant after one and half month after the date of filing of the F.I.R. and the conviction of the Applicant was not probable and hence he is entitled to be released on bail.

5. The learned A.P.P. submitted that the stringent provisions of sub-section (4) of section of the MCOC Act are applicable and there is enough material on record to show the involvement of the Applicant in the offence.

6. It is true that the Applicant has been named by the first informant in his third supplementary statement. However, there are statements recorded of a witness under sections 161 and 164 of the Code of Criminal Procedure, 1908. In the said statements the witness (whose identity is kept secret) stated that the Accused No.1 Jeevashri Naidu came to her house with a brief case in his hand. He took a knife from the witness and opened the brief case. After the brief case was opened, it was found that there was ornaments therein. She stated in her statement dated 30th August 2004 the said Jeevashri introduced person accompanying him as Vilas, Vishwas, Vijay, Gajya and Rajesh. She

gave description of the Applicant in her statement. According to her the co-accused Jeevashri Naidu informed her that he along with his associates have robbed a jeweller and obtained ornaments from him. The said co-accused Jeevashri Naidu threatened the witness not to disclose the incident to anyone. Hence out of fear, she did not complain to the police. In her supplementary statement she disclosed that on 9th September 2004 she identified Vijay alias Vijay Marwadi alias Jayantilal i.e. the present Applicant.

7. There is material to show that the Applicant received a sum of Rs.53,000/- out of the total booty worth Rs.8,50,000/-. The allegation is that the Applicant is a member of organised crime syndicate headed by co-accused Vishwas Narayan Patil.

8. It must be borne in mind that stringent conditions of section 21(4) of the MCOC Act govern this application. The learned counsel appearing for the Applicant pressed into service the Judgment of the Apex Court in the case of Vasanthi (supra). He placed reliance on the paragraph 7 of the said Judgment which reads thus:

> "If we apply the probability test that has been propounded by this Court to the facts of the present case, it is difficult to reach a tentative conclusion that the appellant in all probability will be convicted of the offence."

The submission was that the test laid down by the Apex Court is that the accused is entitled to bail if it is difficult to reach a tentative conclusion that the accused in all probability will be convicted of the offence. However, in my view the said observation cannot be read as a ratio of the decision of the Apex Court in the said case of Vasanthi. In the said decision the Apex Court relied upon its own decision of a larger Bench reported in 2005 S.C.C.(Cri.) page 1057 (Ranjitsingh Sharma v/s. State of Maharashtra). In paragraph 38 of the said decision, the Apex Court held thus:

> "We are furthermore of the opinion that the restrictions on the power of the court to grant bail should not be pushed too far. **If the court, having regard to the materials brought on record, is satisfied that in all probability he may not be ultimately convicted, an order**

granting bail may be passed." (Emphasis supplied)

Thus the test laid down by the Apex Court is that while considering the application for bail which is governed by section 21(4) of the MCOC Act, if the Court, having regard to the material on record is satisfied that in all probability he may not be ultimately convicted, an order granting bail may be passed.

9. The involvement of the Applicant in the crime is reflected from the prima-facie material on record and therefore, it is impossible to record a finding that in all probability the Applicant may not be convicted on the basis of the material which is available. Hence there is no merit in the application and the same is rejected.

Judge.